Filed 10/30/12 P. v. Lelless CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CHARLES LELLESS, Defendant and Appellant.	E054168 (Super.Ct.No. FVI1100568) OPINION

APPEAL from the Superior Court of San Bernardino County. Jules E. Fleuret, Judge. Affirmed in part; reversed in part with directions.

Suzanne G. Wrubel, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Charles Lelless, of carrying a dirk or dagger (Pen. Code, § 12020, subd. (a)(4)).[1] In bifurcated proceedings, he admitted having suffered a prior conviction for which he served a prison sentence (§ 667.5, subd. (b)). He was sentenced to prison for three years and appeals, claiming the jury was misinstructed, the trial court abused its discretion in not permitting the jury to have the knife that was the subject of this prosecution in the deliberation room and defendant's driver's license should not have been suspended as part of his sentence. Based on the concession of the People, we will strike the order suspending defendant's driver's license and direct the trial court to omit it from the minutes of the sentencing hearing. Otherwise, we reject defendant's contentions and affirm.

FACTS

Around 8:00 p.m. on February 26, 2011, a deputy sheriff attempted to stop the car defendant was driving for having burned-out tail lights. Defendant continued driving one-quarter of a mile before pulling over for the officer. Defendant and his passenger, identified as a parolee at large, alighted from the car so quickly that the officer drew his gun and ordered defendant to the ground. The officer holstered his gun and cuffed the prostate defendant's hands behind his back. The officer rolled defendant onto his left side so he could pat down defendant's right side. The officer saw a clip on defendant's pant pocket and what turned out to be the top of a knife handle protruding from the pocket. The officer pulled the knife out of defendant's pocket.

---

[1] All further statutory references are to the Penal Code unless otherwise indicated.

ISSUES AND DISCUSSION

1. *Jury Instruction*

The arresting officer testified that the knife taken from defendant's pocket: "was . . . traditionally a folding knife, but the blade was locked in the open position, the blade exposed." He said that when he threw it to the side, the knife did not retract or fold back into place, but stayed in the same open position as when he found it in defendant's pocket. He went on to state that "it's a folding knife; so I actually folded it . . . thr[e]w it in an [evidence] envelope, . . . and then sealed [the envelope] . . . ." While the officer was on the stand, the knife was shown to him. The officer showed the knife to the jury, commenting that it was still in the folded position. He said when he took it off the defendant, it was not in the folded position, but open. The officer was then showed a digital photograph of the knife in an open position. He testified that the photograph was an accurate depiction of the knife he recovered from defendant. The photograph was passed around to members of the jury. The prosecutor then pointed to, on the actual knife, a particular spot on the knife and the officer agreed that that was the blade. The officer was asked to describe the blade and he said, "It's a blade—it's a folding knife with the blade locked in the open position . . . ." He demonstrated how he found it on defendant. He said that when he pulled it out of defendant's pocket, the blade was open. He said he attempted to fold the blade back in and retract the blade when he put it in the evidence envelope so the blade would not pierce the envelope. When asked how the blade folded back into the handle, he said, "These knives . . . have a little clip here that kind of stops the blade from folding. When you're folding it back, you just push that

little I guess clip and then push the blade back, and it folds (demonstrating), and it kind of locks into place that way." He said the knife could not be folded simply by pushing the blade down—that "it actually takes two hands. You have to press that little lock down so you can fold it. You can sit there and try to force it all day long, it's not going to go." He reiterated that when he pulled the knife out of defendant's pocket, it was locked into the open position. He said that in his experience, he has seen such knives used as stabbing weapons. During cross-examination, he said that when the knife opens to its full length, it locks, adding, "There's a lock on it to keep it from folding back." He also said he believed that there was, "also a mechanism on the folding knife itself, essentially it's a button that you push in order to put on the safety lock . . . ." The knife and the digital picture of the knife were admitted into evidence.

During her argument to the jury, the prosecutor showed the jury the knife in at least the open position and commented that it was a folding knife. She reminded the jury that the officer had actually folded and opened up the knife during his testimony.

The jury was instructed, as pertinent here, "[To prove that the defendant is guilty of] unlawfully carrying a concealed dirk or dagger . . . [¶] . . . the People must prove that: [¶] . . . The defendant carried on his person a dirk or dagger . . . [¶] . . . [¶] A dirk or dagger is a knife or other instrument with or without a handguard that is capable of ready use as a stabbing weapon . . . . [¶] . . . [¶] *A pocketknife*[2] *or non-locking*

---

[2] The People introduced a red herring into the discussion by asserting that the knife at issue was a pocketknife, citing *In re Luke W.* (2001) 88 Cal.App.4th 650. Therefore, they assert, the instruction covered the knife. In *Luke*, the defendant had what

[footnote continued on next page]

folding knife is not a dirk or dagger unless the blade of the knife is exposed and locked into position."[3]

---

appeared to be a cheap version of a Swiss Army "credit card" in which various implements, including plastic tweezers and a plastic toothpick, can be pulled out of a device resembling an audiocassette tape. (*Id* at p. 654.) The device was three and three-eighths inches by two and one-eighth inches by one-eighth inch. (*Ibid*.) One of the implements that could be pulled out of the device was a knife that was three and one-eighth inches long, having a blade that was two and one-fourth inches long and one inch wide at its widest point. (*Id*. at p. 655.) There is no statement that the blade was retractable, and because the People pointed out that the blade did not fold (*ibid*), we assume that, like the knives in Swiss Army "credit cards," this knife was a fixed blade knife. The defendant there asserted that the knife was not a dirk or dagger because it was a pocketknife whose blade was carried in a retracted, unexposed state, i.e., inside the device. (*Ibid*.) The People asserted that the knife was not a pocketknife because the blade did not fold into the handle, like "traditional" pocketknives. (*Ibid*.) The First District concluded that because section 12020 provides for both pocketknives and folding knives, the definition of the former must be broader than the traditional concept of a pocketknife as a knife whose blade folds into its handle. (*Id*. at p. 656.) Because the knife did not fold, it did not fall within the other two exceptions to section 12020, subdivision (a), i.e., for locking folding knives or non-locking folding knives. The appellate court concluded that because the knife there at issue "fits readily and compactly into the pocket of any article of clothing" and because "given its snug fit, [the knife blade cannot] be easily extracted from its slot [in the device] without using both hands . . . it constitutes a pocketknife exception to section 12020, subdivision (a)." (*Ibid.*) In contrast to the knife in *Luke*, there was no evidence here that this eight inch knife fits readily and compactly into the pocket of any article of clothing. In fact, the officer testified that the top portion of the knife handle was sticking out of defendant's pocket. Moreover, not all pockets are eight inches or greater in depth. Additionally, the eight inch knife here is a far cry from the three and one-eighth inch knife in *Luke*. More importantly, *no one* at trial suggested that the knife here was a pocket knife. Certainly, nothing in the record suggests that the jury was aware of the holding in *Luke*. Thus, there was no basis for the jurors here to assume that this eight inch knife was a pocketknife.

3 The People correctly point out that before trial began, defense counsel agreed to the wording of this instruction. It is apparent that both the trial court and counsel misunderstood the standard instruction. For this reason, and because, as we conclude, the instruction as given is inapplicable to the knife at issue here, we cannot agree with the People that the giving of this instruction as modified was a tactical decision on the part of

[footnote continued on next page]

The standard instruction on section 12020, subdivision (a)(4) at the time of the crime and trial read, as to the italicized portion above, in pertinent part, "A . . . folding knife that is not prohibited by Penal Code section 653k . . . is not a dirk or dagger unless the blade of the knife is exposed and locked into position." (Judicial Council of California Criminal Jury Instructions, CALCRIM No. 2501, italics omitted.)

At the time, section 653k defined a switchblade knife as, "a knife having the appearance of a pocketknife and includes a spring-blade knife, snap-blade knife, gravity knife or any other similar type knife, the blade . . . of which . . . can be released automatically by a flick of a button, pressure on the handle, flip of the wrist or other mechanical device, or is released by the weight of the blade or by any type of mechanism whatsoever. 'Switchblade knife' does not include a knife that opens with one hand utilizing thumb pressure applied solely to the blade of the knife or a thumb stud attached to the blade, provided that the knife has a detent or other mechanism that provides resistance that must be overcome in opening the blade, or that biases the blade back toward its closed position."

During her argument to the jury, the prosecutor said of this element of the charged offense, "[I]f the blade of a pocketknife *or a folding knife* or a non-locking folding knife is exposed, meaning it's in the open position, . . . if th[e] blade is showing, and if the blade is in the locked position, if it's locked into position and the blade is exposed, that's a dirk or dagger. . . . That's all we need for this to be a dirk or dagger. The blade is

---

defense counsel. (See *People v. Bradford* (1997) 14 Cal.4th 1005, 1057; *People v. Cooper* (1991) 53 Cal.3d 771, 831.)

exposed and it's locked into position. [¶] . . . [¶] The blade was exposed, the blade was open at the time when it was found."

Defense counsel argued as follows, "There's no question that [defendant] was in possession of a folding knife. . . . What the law requires . . . is that the folding knife be locked and the blade exposed. A folding knife in itself is not illegal. It is perfectly legal to carry a folding knife. In order for it to become a dirk or dagger, it must be open with the blade exposed and locked into that open position. [¶] . . . [¶] [The prosecutor] must prove beyond a reasonable doubt that that folding knife was—the blade was exposed and locked in the open position. . . . [¶] . . . [¶] The defense will concede that [defendant] was in possession of a folding knife and that he knew it was on him, that he knew he had that folding knife. However, this knife is a legal knife, it is a legal folding knife as long as it is not locked in the open position. [¶] . . . [¶] [W]e concede that [defendant] had a . . . folding knife, and it was folded in the folding position." Defense counsel asserted that common sense dictated that defendant would not be driving around with a knife, whose total length, including the blade, was eight inches, with the blade exposed in his pants pocket. She argued the same was true considering the maneuvering defendant did when he was ordered to the ground by the officer upon getting out of the car. She added that if the blade had been exposed, defendant would have had injuries from all the maneuvering he did while driving and while getting on the ground, but he did not. Defense counsel attempted to explain how the knife got open as follows, "The officer pulled it out and threw it to the ground. Some of you may have noticed how quickly this knife opens. The officer was maneuvering it on the stand, and it came right open. Maybe

that's when it occurred." "The knife could have gotten caught on [defendant's] pants when it was thrown out . . . ." "Or maybe[,] quite basically[,] the officer just got it wrong. It happened very fast. [¶] . . . [The officer] should have taken a photo as the knife laid on the ground. . . . That wasn't done."

We agree with defendant that the knife here was not a switchblade knife within the meaning of section 653k. Therefore, the jury should have been instructed that it was not a dirk or dagger unless the blade was exposed and locked into position. Instead, the trial court instructed that a pocketknife or non-locking folding knife is not a dirk or dagger unless the blade is exposed and locked into position. Of course, this makes no sense in and of itself—if the folding knife, which the uncontested evidence presented established this knife was, is non-locking, logically, it can't be locked into position. Further, there was no evidence that this knife was non-locking—all the uncontested evidence was to the contrary. Therefore, there was no reason for the jury to apply this provision, as the knife was neither a pocket knife[4] nor a non-locking folding knife. However, the argument of *both* parties supplied the necessary missing element—that the blade be exposed and locked into position in order for defendant to be guilty, thereby making it unlikely the jury convicted defendant without finding this element beyond a reasonable doubt. (See *People v. Kelly* (1992) 1 Cal.4th 495, 526, 527.) Additionally, the uncontested evidence was that the blade of this knife was exposed and it was locked into that position when it was removed from the defendant. Therefore, the failure of the instruction to require the

[4] See footnote two, *ante*, page five.

jury to find that this was a non-switchblade locking folding knife, was harmless beyond a reasonable doubt. (*Neder v. United States* (1999) 527 U.S. 1, 4 [119 S.Ct. 1827]; *People v. Mil* (2012) 53 Cal.4th 400, 417.)

2. *Refusal of Jury's Request to Have the Knife in the Deliberation Room*

During argument to the jury, the prosecutor said to the jury, "You're actually not going to be able to take [the knife] back [into the jury deliberation room] with you . . . . Safety reasons, right?" Despite this, during deliberations, the jury sent the following note, "Can we see the actual knife? If not, can the bailiff bring it in and demonstrate how it opens, locks, and closes?" In response, the trial court said to both counsel, "We can't send the knife in . . . for safety reasons, and any experiment or demonstration would have had to have been done on the record is what I'm going to tell them, it can't be done in the jury room." The trial court then read to counsel what it intended to read to the jury, which was as follows, "'This knife cannot be sent into the jury room. Any demonstration of how the knife opens, closes and locks would have had to have been done during the trial. You must rely on what you observed during the trial.'" Defense counsel said this was fine.

Defendant here claims that the trial court abused its discretion (*People v. Cochran* (1882) 61 Cal. 548, 552) in refusing to allow the jury to have the knife or refusing to allow the bailiff to take the knife into the deliberation room and demonstrate how it opened, locked and closed. First, as already stated, the officer demonstrated during his testimony how the knife folded. Therefore, the knife must have been in the open position when he folded it (in fact, he pointed to the blade, commenting that it was locked in the

open position, which had to have occurred when the knife was open), which, in turn, means the officer must have opened it in front of the jury because it was in a closed position when he removed it from the evidence envelope. He also testified that one has to push the clip in order to fold the knife, therefore, in folding the knife, the jury necessarily saw him push on the clip. Thus, the officer demonstrated for the jurors the three things they asked the bailiff to demonstrate for them. If defendant wished someone else to open, close and lock the knife, he could have called his own witness to do so, but he did not. Therefore, defendant has no basis to argue that the trial court abused its discretion or denied him a fair trial by refusing to allow the bailiff to demonstrate what the officer already had.[5]

As to having the knife in the deliberation room, we have no doubt that the request was motivated by defense counsel's speculation, in his argument to the jury, that perhaps the knife was closed when taken from defendant, but it opened of its own accord when it got caught on defendant's pants as it was being pulled out of the pocket or when the officer threw it and it hit the ground. Of course, neither of these scenarios were based on evidence adduced at trial. Defendant was free to introduce evidence that the knife could be opened in either of these manners, but he failed to do so. The trial court was correct that it would have been improper for the jury to stage a demonstration with the knife, attempting to open it by pulling it out of a pocket or throwing it onto the ground. Beyond

[5] Defendant asserts in his opening brief that "once the blade begins to open, its pops out to a locked position automatically." He cites no part of the record in support of this statement. If this is the case, clearly the jury would have picked up on that when the officer opened and closed the knife.

this, the knife was a dangerous weapon that the jury had been told, in advance, would not be going into the deliberation room. For the trial court to keep it out under the circumstances was not arbitrary and irrational. Having disposed of defendant's contentions on the merits, we need not address the fact that he forfeited his current claim by his attorney agreeing with the trial court's proposed response to the jury, or that this action constituted ineffective assistance of counsel.

3. *Revocation of Defendant's Driver's License*

The sentencing court found that a motor vehicle had been involved in the commission of the offense and revoked defendant's driving privileges for two years. The parties agree that this was improper. Therefore, we will strike that portion of the sentence and direct the trial court to delete it from the minutes of the sentencing hearing.[6]

DISPOSITION

The order revoking defendant's driver's license for two years is stricken and the trial court is directed to omit any reference to it in the minutes of the sentencing hearing. In all other respects, the judgment is affirmed.

---

[6] The order does not appear on the abstract of judgment.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

MILLER
J.